(7)

No. 91-690

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DALE FARRAR and PAT SMITH,
as Co-Administrators of the Estate of
Joseph D. Farrar, Deceased,
Petitioners,

v.

WILLIAM P. HOBBY, JR.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

MOTION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

* Counsel of Record

June 15, 1992

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of

William P. Hobby, Jr., Respondent, whose written consent has been provided to the Clerk of the Court. Counsel for EEAC repeatedly has attempted to secure the consent of counsel for Petitioners but has received no response. In support of this motion, EEAC by the following shows that its brief brings relevant matter to the attention of this Court that has not been (or will not be) presented by the parties.

1. The Equal Employment Advisory Council (EEAC) is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The issue before the Court in this case involves the proper interpretation of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. One of the statutes covered by Section 1988 is 42 U.S.C. § 1981, which often is used as a basis for lawsuits challenging employment practices of private employers. Moreover, the fee-shifting provisions of Section 1988 and of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(k), contain virtually the same language and have been given similar interpretations by the courts. The manner in which the Court interprets Section 1988 in the instant case, therefore, will have an important impact on the availability of attorney's fee awards in employment discrimination litigation. Because all of EEAC's members, and the constituents of its association members, are employers subject to the attorney's fees provisions of both Section 1988 and Title VII, those members have had much experience in matters relating to attorney's fee awards. Thus, EEAC's members have a direct interest in the outcome of this case.

3. The issue presented in this appeal is extremely important to the nationwide constituency that EEAC represents. The Fifth Circuit Court of Appeals ruled that a civil rights plaintiff who seeks only money damages and receives merely one dollar in nominal damages is not a "prevailing party" entitled to an award of attorney's fees under Section 1988. This conclusion is consistent with this Court's recent decisions regarding the proper interpretation of the term "prevailing party."

4. Motivated by its concern for how Section 1988 and similar attorney's fee provisions are interpreted, EEAC has filed *amicus curiae* briefs in this Court in *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S. Ct. 1138 (1991) (concerning the maximum amount of expert witness fees that may be awarded); *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (concerning proportionality of fees to the amount of damages recovered); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (concerning the simultaneous negotiation of attorney's fees and the merits in civil rights class actions); *Marek v. Chesny*, 473 U.S. 1 (1985) (concerning the interplay between Section 1988 and Fed. R. Civ. P. 68); *Webb v. Bd. of Educ. of Dyer County, Tenn.*,

471 U.S. 234 (1985) (concerning whether Section 1988 authorizes the recovery of attorney's fees incurred in optional state administrative proceedings); *Hensley v. Eckerhart*, 461 U.S. 424 (1983) (concerning whether a partially successful plaintiff may recover attorney's fees under Section 1988 for legal services on unsuccessful claims); and *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) (concerning the proper standard to be used in deciding whether to award attorney's fees to a successful defendant in a Title VII action).

5. EEAC seeks to assist the Court in this case by highlighting the impact its decision may have beyond the instant case in the field of employment discrimination litigation generally. Accordingly, this brief brings relevant matter to the attention of this Court that has not already been brought to its attention by the parties. Because of its substantial experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

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* Counsel of Record

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*, contingent on the granting of the accompanying motion for leave. The brief urges affirmance of the decision below and thus supports the position of Respondent before this Court.

INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is set forth fully in the preceding motion.

STATEMENT OF THE CASE

The question presented by this case is whether the plaintiff can be considered a "prevailing party" when the sole benefit sought in the suit is money damages and the sole remedy awarded is one dollar. The issue arises from an action filed by petitioner's decedent Joseph D. Farrar against William P. Hobby, Jr., then Lieutenant Governor of the State of Texas, for civil rights violations under 42 U.S.C. § 1983; *Estate of Farrar v. Cain*, 941 F.2d 1311, 1312 (5th Cir. 1991).

When Farrar was charged with murder after a death at the youth facility he operated, Hobby became personally involved in the process leading to closure of the facility. After the murder indictment was dismissed, Farrar filed suit against Hobby and other officials for injunctive relief and monetary damages under 42 U.S.C. §§ 1983 and 1985. Farrar later amended the complaint to drop the injunction claim and increase the damages demand to $17 million. A jury found liability without harm and awarded no damages, and the district court entered judgment on the award. *Id.* at 1312-13.

On appeal, the Fifth Circuit reversed the judgment in part and remanded for an award of one dollar in nominal damages against Hobby alone. The district court then awarded $280,000 in attorney's fees against Hobby pursuant to 42 U.S.C. § 1988, which provides for an award of reasonable attorney's fees to a prevailing party. *Id.* at 1313.

On appeal of the fees award, the Fifth Circuit reversed. Using the standard developed by this Court in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989); *Rhodes v. Stewart*, 488 U.S. 1 (1988); *Hewitt v. Helms*, 482 U.S. 755 (1987); and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Fifth Circuit ruled that plaintiffs did not qualify as "prevailing parties" under 42 U.S.C. § 1988:

> We are persuaded that the Farrars were *not* prevailing parties for the purposes of § 1988, and we therefore reverse. The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made."

Farrar, 941 F.2d at 1315 (quoting *Hewitt*, 482 U.S. at 760). This appeal followed.

SUMMARY OF ARGUMENT

A plaintiff who seeks no relief other than $17 million in damages, and receives no relief other than $1 in nominal damages, is not a "prevailing party" for purposes of 42 U.S.C. § 1988. This Court's unanimous holding in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), building on principles established in *Rhodes v. Stewart*, 488 U.S. 1 (1988); and *Hewitt v. Helms*, 482 U.S. 755 (1987), makes it clear that to cross the statutory threshold of "prevailing party," a plaintiff must achieve "some relief on the merits." 489 U.S. at 792. A $1 nominal damages award does not suffice.

Even if a plaintiff in this situation could be deemed a prevailing party, he would not necessarily be en-

titled to an attorney's fee of the magnitude awarded in this case by the district court. Congress did not mandate full hourly attorney's fee awards in every case, but only "reasonable" fees. Reasonableness requires that the fee award be somewhat proportionate to the results obtained—in this case, nominal.

Indeed, the policies underlying Section 1988 support limitation of an attorney's fee award in cases in which a plaintiff seeks only money and receives only nominal damages. This fee-shifting provision, designed to enable citizens to act as private attorneys general to vindicate important civil rights, does not stretch to cover the costs of individuals who achieve only technical or de minimis results, particularly when those results do not engender any degree of social change.

ARGUMENT

I. A PLAINTIFF WHO SEEKS ONLY MONEY DAMAGES AND RECOVERS ONLY $1 IS NOT A PREVAILING PARTY ENTITLED TO AN ATTORNEY'S FEE AWARD UNDER 42 U.S.C. § 1988

A. To Be A Prevailing Party Under This Court's Decisions in *Hewitt*, *Rhodes* and *Garland*, a Plaintiff Must Receive Actual Relief on the Merits

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is a fee-shifting provision which permits the court in a civil rights action to award a reasonable attorney's fee to the prevailing party as part of the costs assessed against the other party.[1] Determining a fee award thus is a two-stage

[1] Section 1988 of Title 42, United States Code, provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The standards articulated by this Court for awarding fees under 42 U.S.C. § 1988 are "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " including the attorney's fees provision of Title II and VII of the Civil Rights Act of 1964. *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

process. First, the plaintiff must meet the statutory threshold of "prevailing party." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).[2] Then, and only then, the court determines what fee is "reasonable." *Id.*

Accordingly, entitlement to *any* attorney's fee under § 1988 turns on whether or not the plaintiff "prevailed" in the litigation. This Court's unanimous decision in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), building on the foundation established in *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Hewitt v. Helms*, 482 U.S. 755 (1987), established recovery or non-recovery of actual relief on the merits as the standard used to ascertain whether or not a plaintiff has in fact prevailed.

"If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] *some of the benefit* the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some

[2] A prevailing-defendant can recover attorney's fees only if the "claim was frivolous, unreasonable, or groundless, . . . [if] the plaintiff continued to litigate after it clearly became so, . . . [or] if the plaintiff is found to have brought or continued such a claim in bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

kind." *Garland*, 489 U.S. at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (emphasis added). "Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792 (quoting *Hewitt*, 482 U.S. at 760-61 and *Rhodes*, 488 U.S. at 3-4). "Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status." *Id.*[3] "Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the 'generous formulation' we adopt today has not been satisfied." *Id.*

Thus, this Court consistently looks to whether or not the plaintiff received any genuine relief on the merits in determining whether the plaintiff indeed "prevailed" in the litigation. A judgment in the plaintiff's favor does not suffice. *Rhodes*, 488 U.S. at 3. As the Court explained in *Hewitt*, the court—and the judgment—are merely the vehicle by which the plaintiff seeks to reach the intended destination, and only

[3] In *Hewitt*, although a prison inmate received a court decree that he was denied due process in a misconduct proceeding, he received no relief because of the defendants' official immunity. This Court concluded that he was not a prevailing party. *Hewitt v. Helms*, 482 U.S. 755 (1987). In *Rhodes*, two prison inmates won a declaratory judgment but no relief because in the interim, one had died and the other had been released. They thus were not prevailing parties. *Rhodes v. Stewart*, 488 U.S. 1 (1988).

by reaching that destination does the plaintiff "prevail."

> In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*.

Hewitt, 482 U.S. at 761.

Applying this standard, the Fifth Circuit correctly ruled that Farrar was not a "prevailing party" in this litigation. Although the jury found that Lieutenant Governor Hobby had " 'committed an act or acts under color of state law that deprived Plaintiff Joseph Farrar of a civil right,' " 941 F.2d at 1312-13, it found no injury, and awarded no damages. Accordingly, instead of the $17 million he claimed,[4] Farrar received only $1 in nominal damages, a technical requirement because a civil rights violation was shown.[5]

[4] Farrar's claim for injunctive relief was dropped early in the litigation. *Farrar*, 941 F.2d at 1312.

[5] Although the jury awarded no damages, the Fifth Circuit initially reversed in part and directed the district court to enter an award of nominal damages, not to exceed one dollar, because a civil rights violation was shown. *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985) (citing *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978)). In *Carey*, this Court ruled that "the denial of procedural due process should be actionable

Accordingly, "[t]he only 'relief' he received was the moral satisfaction of knowing that a federal court concluded that his rights had been violated." *Hewitt*, 482 U.S. at 762. Since Farrar achieved none of the $17 million benefit sought by the litigation, and the outcome "did not in any meaningful sense 'change the legal relationship' between the Farrars and Hobby," the Fifth Circuit concluded that Farrar had not prevailed. *Farrar*, 941 F.2d at 1315.[6]

B. Technical Success, Such As an Award of Nominal Damages, Does Not Constitute Relief Sufficient to Support an Award of Attorney's Fees

The Fifth Circuit's holding is consonant with this Court's clear direction in *Garland*, *Rhodes*, and *Hewitt* that to prevail is to achieve "some of the benefit" sought. *Garland*, 489 U.S. at 791-92. Farrar received no benefit from this litigation—no money damages, no injunctive relief, no change in the defendants' behavior—indeed, nothing that "changes the legal relationship" in any way. *Walker v. Anderson Elec. Connectors*, 944 F.2d 841, 847 (11th Cir. 1991) (holding that jury finding of sexual harrassment "no more altered the legal relationship between the parties than the Third Circuit's finding of a due process violation in *Hewitt*.").

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for nominal damages without proof of actual injury," and implied that the same rule applies to cases involving other constitutional violations as well. *Carey v. Piphus*, 435 U.S. at 266-67.

[6] Although the plaintiffs now argue that their success was sufficiently significant to warrant an award of attorney's fees, we seriously doubt that they would view an attorney's fee award of $1 as significant.

The award of $1 in nominal damages indeed is the type of "technical" success which this Court has suggested would not support an attorney's fee award. *Garland*, 489 U.S. at 792. *See also Huntley v. Community Sch. Bd. of Brooklyn, New York Dist. No. 14*, 579 F.2d 738 (2d Cir. 1978) (award of $100 in nominal damages is a " 'moral victory' of insufficient magnitude to warrant an award under § 1988").[7] *Cf. Carr v. City of Florence, Ala.*, 729 F. Supp. 783, 791 (N.D. Ala. 1990) ("This court cannot bring itself to characterize the $100.00 judgment in favor of one of twelve plaintiffs against one of eleven defendants as anything but 'purely technical' or 'de minimis.' "), *aff'd mem.*, 934 F.2d 1264 (11th Cir. 1991); *Spencer v. General Elec. Co.*, 894 F.2d 651, 662 (4th Cir. 1990) (dicta) (suggesting that if sexual harrassment case had not led to revision of company's anti-harassment policy, nominal damages award might be technical or de minimis victory unworthy of attorney's fees award under *Garland*). Farrar received nomi-

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[7] Although later Second Circuit panels have ruled that nominal damages alone can support an award of attorneys fees, *see Lyte v. Sara Lee Corp.*, 950 F.2d 101 (2d Cir. 1991) (Title VII); *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991) (§ 1988), they did so without addressing *Huntley*. Interestingly, Judge Miner of the Second Circuit, who wrote the opinions in both *Lyte* and *Ruggiero*, served on a panel in 1989 which denied attorney's fees under 17 U.S.C. § 505, which provides for attorney's fees to a prevailing party in a copyright infringement case. *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989). Although Warner Bros. was awarded $100 in statutory damages, the panel, applying *Garland*, concluded that the award was not "sufficiently significant to mandate an award of attorney's fees." *Id.* at 1126. Neither *Lyte* nor *Ruggiero* distinguished *Warner Bros.*

nal damages only because of a technical requirement.[8] His success is thus "purely technical" *and* "de minimis" so that the Fifth Circuit's denial of fees is justified under *Garland*.[9]

Indeed, any other result in this case would be "legal nonsense." [10] It defies logic that a litigant who sought as huge a sum of money as $17,000,000—and no other relief—and was awarded only $1 would *himself* believe that he "prevailed." It is highly unlikely that when the jury's verdict was announced, the plaintiff was the party wearing the smile.

At the end of his rainbow, Farrar did not find any gold in the pot he sought. Under *Garland*, *Rhodes*, and *Hewitt*, "some relief on the merits" which "changes the legal relationship" is the touchstone for an award of attorney's fees. Since Farrar received none of these things, he has not met the statutory threshold and is not entitled to attorney's fees under Section 1988.

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[8] *Farrar v. Cain*, 756 F.2d 1148, 1152 (5th Cir. 1985).

[9] As the Fifth Circuit noted, several other circuits have held to the contrary. *Farrar*, 941 F.2d at 1316 and n.22. As the court correctly observed, however, these cases generally preceded or failed to address this Court's decisions on point. *Id.* at 1317.

[10] "Legal nonsense" is former Chief Justice Burger's description of a $245,456.25 fee award in a case where $33,350 in damages were recovered. *City of Riverside v. Rivera*, 477 U.S. 561, 587 (Burger, C.J., dissenting). In *Riverside*, the damages recovered were 13.6 percent of the fees sought. Here, the damages were only .00035 percent of the fees sought.

II. BASED ON THE RESULTS OBTAINED, THE MAXIMUM ATTORNEY'S FEE AWARDABLE FOR A NOMINAL DAMAGES RECOVERY IS LIKEWISE NOMINAL

Even if Farrar could be viewed as the "prevailing party" in this litigation, at which point calculation of a "reasonable" attorney's fee would be appropriate, any fee above a few dollars would be seriously disproportionate to the nominal damages awarded. To be commensurate with the results obtained, therefore, any attorney's fee awarded in this case should be as nominal as the damages award.

A. Under *Hensley*, the Results Obtained are "the Most Critical Factor" in Judging Whether an Award Is Reasonable

The results obtained from the litigation are relevant under Section 1988 not only when eligibility for an attorney's fee award is determined, but also in determining what award would be "reasonable." This Court's analysis in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), is equally applicable here. *Hensley* addressed the issue of whether a prevailing plaintiff who succeeds on less than all of his claims can recover attorney's fees on claims which were unsuccessful.

This Court held that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." 461 U.S. at 440. Indeed, the Court called the level of success "the most critical factor." *Id.* at 436.

While noting that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate", *id.* at

433, this Court went on to explain that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435. "If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonably hourly rate may be an excessive amount." *Id.* This is true regardless of how pure the motive or how virtuous the cause. "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill." *Id.* at 436. The outcome is what matters.

B. The Legislative History of Section 1988 Clarifies that Limited Success Limits the Amount of a Fee Award

The general rule in American courts is that litigants must pay their own counsel fees and that fee-shifting can be ordered only pursuant to specific statutory authority. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Thus, fee-shifting in the instant case, and in similar actions, is appropriate only where a fee award is authorized specifically by 42 US.C. § 1988.

The language of Section 1988 and its legislative history indicate that Congress intended it to have three principal elements. These are: (1) that awards may be made to the prevailing party; (2) that fee awards are not mandatory but are to be allowed at the discretion of the court; and (3) that awards are to be reasonable. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 6-8 (1976). In this statutory scheme, where Congress provided for fee awards only to successful

parties and specifically declined to make those awards mandatory, there is no basis for automatic hourly fee awards in cases that garner nominal damages and nothing more.

Congress believed that reasonable fee awards to successful prevailing parties would be sufficient encouragement to private attorneys general.[11] The statute supports no additional inducements. Indeed, the statutory scheme indicates that Congress was satisfied with the idea that the less-than-successful plaintiff would have to bear his own counsel fees. Congress evidently believed that the mere bringing of an action does not vindicate a public policy important enough to justify fee-shifting.

The legislative history reflects congressional recognition of the possibility that a private attorney general could bring a suit in good faith and yet be unsuccessful. The only protection Congress believed was necessary for this unsuccessful plaintiff was the assurance that he would not have to pay his *opponent's* counsel fees, unless it could be shown that the suit was clearly frivolous, vexatious, or brought for harassment purposes. *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). Nothing in the legislative history, however, indicates a Congressional concern that the prospect of having to pay all or part of their own counsel fees if less than completely successful would

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[11] As this Court explained in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968), a plaintiff bringing suit for an injunction under Title II of the Civil Rights Act of 1964 (prohibiting race discrimination in public accommodations) does so not only for himself but also as a "private attorney general" acting in the public interest. Congress adopted the same concept when enacting § 1988. S. Rep. No. 1011, 94th Cong., 2d Sess. 2-3 (1976).

deter plaintiffs from bringing meritorious civil rights actions.

Thus, even if a plaintiff who has been awarded only nominal damages could properly be deemed a prevailing party, there is no rule requiring that he receive an attorney's fee computed using hours expended at an hourly rate. As this Court ruled in *Hensley*, "[a] reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." 461 U.S. at 440. In other words, "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.*

C. It Would Be Unreasonable to Award More Than a Nominal Attorney's Fee Where Only Nominal Relief Was Obtained

Applying *Hensley*, the dissenting Justices in *City of Riverside v. Rivera*, 477 U.S. 561 (1986),[12] objected to the plurality's approval of an attorney's fee award of $245,456.25 in a case that netted $33,350 in compensatory and punitive damages. 477 U.S. at 588. Recalling *Hensley*'s mandate that counsel exercise "billing judgment" in requesting an attorney's fee award, the dissenting Justices contended that

[12] Chief Justice Burger filed a dissenting opinion in *Riverside*, and Justice Rehnquist filed a separate dissenting opinion in which Chief Justice Burger and Justices White and O'Connor joined. Justice Powell filed an opinion in which he noted that the fee award in that case "seems unreasonable" on its face, but ultimately concurred in the judgment on grounds that, as discussed below at p. 16, suggest he would not have voted to uphold the district court's grossly disproportional fee award in this case.

spending close to 2,000 hours on a case that recovered only $33,000 was "simply not a 'reasonable' expenditure of time." 477 U.S. at 595. The dissent observed:

> One may agree with all of the glowing rhetoric contained in the plurality's opinion about Congress' noble purpose in authorizing attorney's fees under § 1988 without concluding that Congress intended to turn attorneys loose to spend as many hours as possible to prepare and try a case that could reasonably be expected to result only in a relatively minor award of monetary damages.

Id.

The instant case presents a similar situation. In a case in which a jury could find no injury whatsoever, it is difficult to conclude that plaintiffs' counsel's expenditure of the time necessary to accumulate $280,000 in fees was reasonable. The logic of plaintiffs' argument is that they achieved an important victory. The absurdity of that proposition demonstrates the weakness of their arguments. As the Fifth Circuit noted, "This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more." *Farrar*, 941 F.2d at 1315.

Perhaps if plaintiffs had sought and obtained injunctive relief, or if the litigation had engendered a change in policy, the plaintiffs could at least make their argument here with a straight face. None of these things occurred. As the Fifth Circuit pointed out, "The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. 'That is not the stuff of which legal victories are made.'" 941 F.2d at 1315 (quoting *Hewitt*, 482 U.S. at 760).

Even Justice Powell, who concurred only in the judgment in *Riverside*, noted that "[w]here recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought." 477 U.S. at 585 (Powell, J., concurring in result). Justice Powell continued, "In some civil rights cases, however, the court may consider the vindication of constitutional rights in addition to the amount of damages recovered." *Id.* (noting that the *Riverside* verdict "may well have served a public interest" based on allegations that the police misconduct at issue reflected hostility to a particular ethnic community as a whole). Foreshadowing the instant case, however, Justice Powell noted that "[i]t probably will be the rare case in which an award of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." *Id.* at 586 n.3.

Indeed, it is difficult to see what public interest, if any, was served by this lawsuit. Petitioners can point to no concrete benefit to themselves, let alone to the public at large, as a result of this lawsuit. They quote the district court as saying that "[a]warding attorney's fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions . . . [T]he cumulative effect of meritorious civil rights litigation eventually deters impermissible conduct by government officers. . . ." Brief for Petitioners at 19 (quoting unpublished district court order awarding attorney's fees). This is speculation at best. It is highly unlikely that the $1 award in this case inspired much self-analysis among Texas state officials or anyone else. It is equally unlikely that this—rather than the recovery of money damages—was Farrar's motivation in bringing suit since Farrar did not even request relief designed to change any official behavior. Finally, it is the relief awarded, not the attorney's fees, that must be the catalyst for change.

Accordingly, the attorney's fees award of $280,000 has no proportionality whatsoever to the relief actually obtained in this case. Under the dictates of this Court in *Hensley*, and the considerations expressed by the dissenting Justices and Justice Powell in *Riverside*, even if Petitioners could be said to have prevailed in the litigation, such a disparate award is unwarranted. To reflect accurately the principles underlying Section 1988, no more than a nominal attorney's fee, corresponding to the nominal damages, can be justified.

III. PUBLIC POLICY CONSIDERATIONS FAVOR AN INTERPRETATION OF SECTION 1988 THAT DOES NOT AWARD COUNSEL FEES EXCEPT FOR LEGAL SERVICES REASONABLY SUPPORTIVE OF PLAINTIFF'S SUCCESS AS A PRIVATE ATTORNEY GENERAL. TO MEET ITS GOALS, SECTION 1988 SHOULD AT MOST OFFER FEES COMMENSURATE WITH SUCCESS

The fee-shifting provision in Section 1988 embodies a recognition that fee awards will act as an inducement to the filing of lawsuits. In practical terms, it is inevitable that such a fee-shifting statute will serve to encourage whatever types of lawsuits it rewards. If only private relief is sought and little is obtained, with no real hope of a change in circum-

stances otherwise, and yet fees are shifted to the defendant, the result "turns § 1988 into a relief Act for lawyers." *Riverside*, 477 U.S. at 588 (Rehnquist, J., dissenting). There is a distinct danger in such cases that awards of fees based on the full scope of litigation that ultimately failed in its intended purpose may result in windfalls to plaintiffs' attorneys and may encourage excessive litigation of questionable or necessary claims. It was to avoid this result that this Court held in *Hensley* that the fee award for a partially successful plaintiff must be "reasonable in relation to the results obtained," 461 U.S. at 440, and that "the most critical factor" in determining the amount of the award "is the degree of success obtained." *Id.* at 436. This emphasis on the degree of the plaintiff's success ensures that attorney's fees will be awarded only to the extent that the plaintiff has vindicated some important public policy and thus has fulfilled the purpose of Section 1988.

As discussed above, this Court observed in *Hensley* that "[a] reduced fee award is appropriate if the relief, however significant, is limited *in comparison to the scope of the litigation as a whole.*" *Id.* at 440 (emphasis added). In cases such as this, where only damages are involved, EEAC submits that the adoption of a requirement that fees bear a reasonable relationship to the amount of damages recovered would better ensure the relationship between the fee award and the plaintiff's degree of success that *Hensley* recognized as being necessary to fulfill the purposes of Section 1988.

In *Christiansburg Garment Co.*, this Court suggested that awarding fees only to *prevailing* plaintiffs would not in itself be an incentive for plaintiffs to bring claims that have little chance of success. 434

U.S. at 422. For the plaintiff who is deemed "prevailing" even though he or she has achieved limited success, however, this will be true only if there is a requirement of some reasonable degree of proportionality between the amount of the fee award and the relief obtained.

A plaintiff's attorney knows that succeeding on any significant civil rights claim and achieving some of the benefit sought will qualify the plaintiff as a "prevailing party" and in most cases will entitle the plaintiff to some amount of attorney's fees. *Garland*, 489 U.S. at 789. However, if there is a possibility that the court may award fees even for cases whose sole result is a $1 nominal damages award, there will be a strong incentive for the attorney to bring such cases despite the possibility that they will not result in any material success for the client. The attorney may be willing to gamble that a jury will bring in at least a favorable liability finding, and that the trial court will award fees based on all of the time spent on the case. That is precisely what the district court in the instant case did, awarding petitioner's attorneys a substantial windfall for their nominal success. A requirement that the amount of the fee award must bear some reasonable relationship to the plaintiff's degree of success would remove any incentive to bring lawsuits where no public interest is at stake and no harm occurred.

In the area of employment discrimination litigation, it is standard practice for plaintiffs to file actions claiming monetary damages under 42 U.S.C. § 1981.[13] Believing that they have been discriminated

[13] With the passage of the Civil Rights Act of 1991, Pub. L. No. 101-166 (1991), Title VII claimants are now be able to sue for compensatory and punitive damages.

against in employment, they often bring suit to challenge what at best is an isolated incident rather than an indication of a pattern or practice of widespread discrimination. Rather than trying to improve conditions for others, they simply seek retribution for what they perceive to be an individual wrong.

While such a suit is permitted under the law, it does not necessarily make the plaintiff a "private attorney general" acting in the public interest. If in such cases, plaintiffs' attorneys know that the only result necessary to cover their fee is a nominal damages award, it may be expected that they will "roll the dice" and pursue these claims regardless of the prospect for success, rather than making an initial reasoned determination of the likelihood of success on the merits. By threatening to litigate such claims, the plaintiff can exert pressure on the employer either to accept an inflated settlement demand or to litigate the matter at significant expense.

Generally, public policy does not favor coerced settlements or unnecessary litigation. The area of civil rights is no exception. Indeed, under Title VII of the Civil Rights Act of 1964, the public policy favoring voluntary settlement of civil rights matters through comprehensive negotiation and conciliation is reflected in the statutory scheme.[14] An interpretation of the

[14] 42 U.S.C. § 2000e-5(k). *See Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for voluntary settlement of employment discrimination claims."), and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). The counsel fees provision in Title VII is virtually identical to the provision in Section 1988 at issue in this case. The legislative history of the Title VII fees provision is quite brief, but it does include an explanation by Senator Humphrey that the purpose of the provision was to "make it easier for a plaintiff of limited means to bring a meritorious suit." 110 Cong. Rec. 12724 (June 4, 1964) (statement of Sen. Humphrey).

counsel fees provision which awards fees only for services reasonably reflective of plaintiffs' success fully satisfies the public policy of encouraging meritorious claims by victims of discrimination. And it does so without offering an inducement for expanded litigation that would interfere with the desirable process of settlement negotiations.

CONCLUSION

For the foregoing reasons, EEAC respectfully urges that the Fifth Circuit decision be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
Attorneys for Amicus Curiae Equal Employment Advisory Council

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* Counsel of Record